

In the United States Court of Federal Claims

No. 07-165 C
(Filed July 2, 2013)

HERNANDEZ, KROONE AND)
ASSOCIATES, INC.,)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
Defendant.)

ORDER

Pursuant to RCFC 54(d)(2)(B) a motion for attorneys' fees must be filed "[w]ithin 30 days after the date of final judgment as defined in 28 U.S.C. § 2412(d)(2)(G)." As so defined, the judgment is not final until the appeal time expires, and when an appeal is filed, a judgment does not become final until the appellate court has issued its mandate and the time for filing a petition for *certiorari* with the Supreme Court has expired. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 531 F.3d 1367, 1372 (Fed. Cir. 2008).

In the instant case the defendant's RCFC 59 motion (ECF No. 202), filed April 24, 2013 and denied on June 25, 2013, served to extend the time for filing a notice of appeal. FRAP 4(a)(4); *Maxus Energy Corp. v. United States*, 31 F.3d 1135, 1139-40 (Fed. Cir. 1994). Accordingly the 30-day period for filing a motion for attorneys' fees pursuant to RCFC 54(d)(2)(B) has not commenced.

Nevertheless, plaintiff has filed a Motion for Attorneys' Fees (ECF Nos. 212-13), and defendant has filed a motion to strike plaintiff's filing (ECF No. 214).

Most court precedent supports dismissal without prejudice to subsequent refile as the remedy for a premature motion for attorney's fees filing. There also exists precedent for deeming the premature motion filing to be subsequently filed during the appropriate 30-day period. *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987).

Accordingly, it is **ORDERED** that:

(1) Plaintiff's Motion for Attorneys' Fees (ECF Nos. 212-13) shall be held by the clerk in abeyance to await the occurrence of judgment finality as defined in 28 U.S.C. § 2412(d)(2)(G).

(2) Upon judgment finality pursuant to (1) plaintiff shall promptly file either a notice to proceed with its motion being held in abeyance or, alternatively, file a substitute motion.

(3) The time for objections under RCFC 54(d)(1)(C)(i) and a response under RCFC 54(d)(2)(D)(i) shall commence to run upon service of plaintiff's notice or substitute motion filed pursuant to (2).

(4) Except to the extent **GRANTED** herein, defendant's motion to strike (ECF No. 24) is otherwise, **DENIED**.

s/ James F. Merow

James F. Merow

Senior Judge